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NO. 81-

in the

Supreme Court

of the

United States

October Term, 1981

BERNARD H. HOROWITZ, and
DAVID HOROWITZ,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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QUESTIONS PRESENTED

1. WHETHER THE PROSECUTOR'S MISCONDUCT AT TRIAL WAS SO PERVASIVE AND PREJUDICIAL AS TO DENY THE DEFENDANTS' RIGHTS TO A FAIR AND IMPARTIAL TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHERE

   (A) DURING CLOSING ARGUMENT TO THE JURY, THE PROSECUTOR POINTED TO THE DEFENDANTS' AND INDIRECTLY COMMENTED ON THEIR FAILURE TO TESTIFY; AND

   (B) THE PROSECUTOR'S CLOSING ARGUMENT WAS IMPROPER AND INFLAMMATORY, DESIGNED SOLELY TO PREJUDICE THE DEFENDANTS IN THE EYES OF THE JURY.

2. WHETHER A DEFENDANT IS DENIED HIS RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHERE AN ATTORNEY, REPRESENTING DEFENDANT, HAD BEEN LISTED AS A STATE'S WITNESS AND HAD PREVIOUSLY REPRESENTED A STATE'S WITNESS AND HELPED SECURE IMMUNITY FROM PROSECUTION FOR THAT WITNESS, RESULTING IN A CLEAR CONFLICT OF INTEREST TO WHICH THE TRIAL COURT DID NOT ADEQUATELY RESPOND.

3. WHETHER PETITIONER DAVID HOROWITZ WAS DENIED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE WAS REPRESENTED AT TRIAL BY THE SAME ATTORNEYS WHO REPRESENTED THE CO-DEFENDANT IN THE CASE.

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CITATION TO THE OPINION BELOW

The decision of the District Court of Appeal of Florida, Fourth District, has not yet been reported. *Horowitz v. State*, ___ So.2d ___ (Fla. 4th DCA, Opinion filed May 6, 1981). (A. 1).[1]

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[1]The symbol "A." refers to the Appendix attached hereto.

JURISDICTION

The Judgment of the District Court of Appeal of Florida, Fourth District, was entered on May 6, 1981, affirming *Per Curiam* without opinion Petitioner's conviction (A. 1). The Court of Appeal denied a timely Petition for Rehearing on June 10, 1981 (A. 2).[2] The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The case, *sub judice*, involves Petitioners' right to a free and impartial trial, due process of law, and effective assistance of counsel free from conflicts of interest as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. U.S. Const., Amend. V, VI and XIX, §1. (A. 35-36).

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[2]Review by the Supreme Court of Florida is precluded by Florida Rules of Appellate Procedure 9.030(a)(2)(A) which bars review of *Per Curiam* affirmed decisions of the District Court of Appeal.

STATEMENT OF THE CASE

On July 19, 1977, Petitioners Bernard and David Horowitz, father and son, and others, were charged, by the filing of a criminal Information, with various offenses relating to the sale of unregistered securities. Subsequently, on June 15, 1978, a second amended Information was filed, charging only Petitioners Bernard and David Horowitz. Both Petitioners were subsequently convicted.

In 1971, Petitioner Bernard Horowitz formed Equitable Development Corporation (hereinafter referred to as "EDC") for the purpose of acquiring and developing real estate in Florida. Bernard Horowitz was president of EDC and his son, David, was treasurer. EDC acquired two large tracts of land, one of which, Highland Park Estates (hereinafter referred to as "HPE"), was purchased from Delstar Corporation (hereinafter referred to as "Delstar"). This acquisition and the subsequent efforts to finance its development and resale were the subject matter of the alleged criminal activity. The purchase involved a minimum down payment and a blanket first mortgage in favor of Delstar.

In its effort to finance its lot subdivision sales program, EDC entered into an exclusive contract with Financial Resources Corporation (hereinafter referred to as "FRC") whereby FRC was to "sell"[3] promissory notes, executed by EDC, to private investors. These notes were to be secured by a first mortgage on various lots within HPE. All investors were informed that the

[3]The word "sell" is a misnomer. In reality, investors *lent* money, in varying amounts, to EDC.

promissory notes they received were secured by a first mortgage on certain lots in HPE. The lots, however, were already burdened with a first mortgage[4] to Delstar. The State's theory was that the individual lot releases from the Delstar master mortgage were never obtained by EDC for the lots which had been given to the investors who had "purchased" EDC's promissory notes. Culpability and criminal liability hinged on Petitioners' intent with respect to their failure to obtain these lot releases.

During the State's closing argument to the jury, the prosecutor pointed to the Petitioners, who did not testify at trial, and stated: "If your intention was good, Bernard Horowitz and David Horowitz, why were not those releases obtained back in February?" (A. 22). Additionally, in questioning a State's witness regarding a conversation the witness allegedly had with Bernard Horowitz regarding the releases, the prosecutor elicited from the witness, on two separate occasions and over Petitioners' objections, that he told Bernard Horowitz: "What good would [the releases] do because the 'crime' has been committed." (A. 12-14, 16-18).[5]

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[4]This Delstar master mortgage had a clause authorizing the release, on a non-contiguous, random basis of individual lots upon EDC's meeting certain requirements, particularly payment of certain amounts of money.

[5]The first time the witness' lay opinion as to the ultimate fact came out, the Judge instructed the prosecutor that he was concerned with the comment and the jury would have to be instructed to ignore the statement. (A. 14). Despite this admonition and the Judge's subsequent instruction to the jury (A. 14), the prosecutor, on the very next day, elicited the exact same statement from the witness in the presence of the jury. (A. 16-18).

Initially, the attorney of record for both Bernard and David Horowitz was Albert Siegel. (A. 28-29, 30-31). However, as the Clerk's minutes reflect, Mr. Siegel's motion to withdraw from the case (presumably due to his having been listed as a State's witness with knowledge of material facts) was granted October 7, 1977 (A. 32-33). Nevertheless, Ben Cohen, apparently lead counsel for both Petitioners (A. 9-10) who filed a notice of appearance as "co-counsel" on May 11, 1978 (A. 4), was "assisted" by Mr. Siegel throughout the course of the trial. (For example, A. 9, 9-10, 15). Although at times during trial it was very difficult to discern which attorney represented which Petitioner (A. 9-10), it is clear from the Record that Mr. Siegel fully participated in all aspects of the trial on behalf of *both* Bernard and David Horowitz.

Lester Green, a key State witness and a defendant in the original Information (A. 27), was represented by Albert Siegel (A. 30-31). Mr. Siegel obtained, for Mr. Green, in exchange for his testimony, immunity from prosecution. (A. 20-21). Moreover, Mr. Siegel, aside from representing Petitioners, was also listed by the prosecutor as a State's witness. (A. 5-6). In a hearing conducted prior to trial, the issue of Mr. Siegel's possible conflict of interest was discussed. At this hearing, Petitioners allegedly "waived" their right to conflict free assistance of counsel, however, this waiver clearly was not intelligent and voluntary. (A. 25-26).

On numerous occasions throughout the trial, both the attorneys and witnesses used the term *"Mr.* Horowitz" without differentiating between David the son, and Bernard the father. (See, e.g., A. 11). Failure to make this distinction was especially obvious and misleading during a witness' testimony as to exactly who had

authority over mortgage fund disbursements – Bernard, or David (A. 11) – which was the gravamen of the State's case.

Following a jury trial on November 15, 1978, Petitioner Bernard Horowitz was adjudicated guilty and sentenced to a total of thirty-five (35) years imprisonment for twenty-one (21) counts of "Fraudulent Securities Transactions". On November 17, 1978, Petitioner David Horowitz was sentenced to two (2) years imprisonment for two (2) counts of "Fraudulent Securities Transactions".[5] On May 6, 1981, the District Court of Appeal, Fourth District, rendered its decision affirming the Trial Court Per Curiam without opinion. (A. 1). The Court of Appeal denied a timely Petition for Rehearing on June 10, 1981. (A. 2).

[5]Petitioner David was also placed on five (5) years probation with the condition that he pay a fine of $10,512.00 plus restitution, the amount, mode and manner to be determined by the Probation Office.

REASONS FOR GRANTING THE WRIT

The granting of this Petition for Writ of Certiorari will advance the administration of criminal justice by clarifying the proper application to all criminal defendants of the Fifth, Sixth and Fourteenth Amendments' guarantees of a fair and impartial trial, free from prosecutorial misconduct, and establish much needed rules of law with respect to claims of ineffective assistance of counsel. Unless redressed, Petitioners will suffer irreparable, blatant violations of rights guaranteed them by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. State Court enforcement of the right to a fair trial and effective assistance of counsel free from conflicts of interest ought to be consistent with this Court's decisions. Petitioners were denied these rights at the trial level and the Appellate Court affirmed without the benefit of a written opinion. Granting this Writ will enable this Court to offer much needed clarification and amplification of its prior decisions in the area of a defendant's right to a fair and impartial trial unimpeded by prosecutorial misconduct, ineffective assistance of counsel and counsel free from conflicts of interest.

1. THE CUMULATIVE EFFECT OF THE PROSECUTING ATTORNEY'S ACTIONS AT TRIAL RESULTED IN THE DEPRIVATION OF PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS.

(A) The Prosecutor's Comment on the Petitioner's Failure to Testify.

The prosecutor's indirect comment, coupled with his actions during closing argument to the jury on the Petitioner's failure to testify, deprived Petitioners of their constitutionally protected right to be free from self-incrimination and is wholly adverse to this Court's prior decisions in this area.

It is firmly established that the Fifth Amendment, made incumbent on the States by reason of the Fourteenth Amendment, forbids comment by the prosecution on the accused's failure to testify. *Griffin v State of California*, 380 U.S. 609, 615, (1965). In *Griffin*, this Court declared: ". . . comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice . . . which the Fifth Amendment outlaws." (Citations and footnote omitted). *Id.* at 614. This Court went on to say: "What the jury may infer, given no help from the court is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." *Id.* at 614.

In *Chapman v. State of California*, 386 U.S. 18 (1967), this Court addressed the issue of whether a violation of *Griffin, supra*, can be held to be harmless. The standard set by this Court was that a prosecutor's comment on the accused's silence is held harmless, *only* if it is found to be "harmless beyond a reasonable doubt." *Chapman v. State of California, supra*, at 24.

This Court has never had the opportunity to squarely address the issue of whether a prosecutor's allusions to and indirect comment on the accused's failure to testify can be held to be harmless. In *Griffin v State of California, supra*, and the line of cases following it, this Court repeatedly stressed that a prosecutor's direct comment

to the jury on the failure of a defendant to testify is violative of the self-incrimination clause of the Fifth Amendment. *Chapman v. State of California*, 386 U.S. 18 (1967); *Fontaine v. California*, 390 U.S. 593 (1968); *Anderson v. Nelson*, 390 U.S. 523 (1968). However, in all these cases, a State constitutional provision permitted comment on the defendant's silence. In those cases, the prosecutor's comments were extensive and stressed to the jury as a basis of conviction. *See, e.g., Anderson v. Nelson, supra.*

In a more recent case, this Court, while confronted with the problem of a prosecutor's indirect comment on an accused's failure to testify, did not fully address the issue. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the petitioner contended that the prosecutor's repeated references, in his closing remarks, to the State's evidence as "unrefuted" and "uncontradicted" constituted an impermissible comment on her failure to testify. This Court held, however, that the prosecutor's comments were not unconstitutional since petitioner's *own counsel* had focused the jury's attention on her silence by outlining her contemplated defense in his opening statement and by stating to the jury that petitioner would be the "next witness". *Lockett v. Ohio, supra*, at 595. *Sub judice*, only the prosecutor focused the jury's attention on Petitioners' failure to testify at trial.

In the instant case, although the prosecutor's comment on Petitioners' silence was not as extensive nor as direct as those made in *Griffin v. State, supra*, it was just as prejudicial to Petitioners and cannot be deemed harmless. Petitioners were charged with selling promissory notes to the public, secured by first mortgages without obtaining releases from the original, master

mortgage. The prosecuting attorney made the following statement during his closing argument before the jury:

> The State is bound to prove that their [Petitioners'] intention was bad; that there was bad faith, that they intended to defraud these people. *If your intention was good, Bernard Horowitz and David Horowitz, why were not these releases obtained back in January or February?*

(A. 22) [Emphasis added]. Additionally, the prosecutor actually *pointed to both the Petitioners*, in the presence of the jury, as he asked the question emphasized above. Although the prosecutor denied pointing toward the Petitioners (A. 24-25), the trial judge found otherwise. (A. 23). Petitioners objected to the prosecutor's remarks, however, their motion for mistrial (A. 22-23) was denied. (A. 23). In light of the offense with which Petitioners were charged, the prosecutor's comment clearly was not "harmless beyond a reasonable doubt" and warrants reversal. See *Chapman v. State of California, supra.* As this Court stated in *Chapman v. State of California, supra*, at 26: "Petitioners are entitled to a trial free from the pressure of unconstitutional inferences."

(B) The Prosecutor's Closing Argument.

The prosecutor's closing argument was improper and inflammatory, designed solely to prejudice the Petitioners in the eyes of the jury. The boundaries within which a prosecuting attorney may properly conduct himself at trial were delineated by this Court in *Berger*

v. United States, 295 U.S. 78 (1935). There the court stated:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done. As such he is in a peculiar and very definitive sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. *But while he may strike hard blows, he is not at liberty to strike foul ones.* It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88 [Emphasis added]. This Court has applied these principles to a prosecutor's closing remarks to a jury as well. See *Viereck v. United States*, 318 U.S. 236 (1943).

In the instant case, the prosecutor failed in his duty to act impartially and to "use every legitimate means" to bring about a "just" conviction. First, as stated earlier, during summation to the jury, the prosecutor commented on the Petitioners' failure to testify, thereby violating Petitioners' right to be free from being compelled to testify as guaranteed by the Fifth and Fourteenth Amendments. Second, the

prosecutor invited speculation on a non-existent issue. In his closing argument, the prosecutor stated:

> You are to decide whether or not they are guilty; whether they defrauded these people. *You are to decide if they are responsible for the financial loss suffered by these individuals.*

(A. 21-22) [Emphasis added]. When this remark is read in light of the State's case, the prejudicial appeal to the jury's sympathies is clear. Fourteen State witnesses, all "victims" of the Petitioners' alleged crime, testified as to the thousands of dollars they lost by virtue of their investments in Petitioners' company. The jury's task was to determine whether or not a fraud was committed. The prejudicial effect of the prosecuting attorney arguing that the jury can determine if the defendants were *responsible* for those investors' losses cannot be denied.

Finally, the prosecutor's closing argument to the jury contained "facts" not in the record. The prosecutor stated:

> Now, what I am suggesting to you is this: $2,800.00 was what was going to be paid back, in excess of what was brought in, and all the corporation actually got was $2,050.00. That leaves $750.00 in the hole. Now, this presupposes—this figure presupposes that they intended—intended to never get the releases. That was financially impossible. It was financially unfeasible. They never could have, because they were in the red. It never would have worked.

(A. 25). Petitioners objected to this statement and a lengthy argument ensued (out of the presence of the jury). The prosecuting attorney attempted to argue that Petitioners never intended to get the releases from the master mortgage because it was financially impractical. However, *not* all the figures and amounts the prosecutor relied on to reach his conclusion were actually in evidence. Moreover, the prosecutor's argument that "it was financially impracticable to obtain the releases" was clearly erroneous because he failed to account for the retention, by Petitioners' company, of the mortgage investors' money and the ever-increasing value of the property over time.

Thus, the prosecutor's remarks to the jury were not only "hard blows" but "foul ones" as well. See *Berger v. United States, supra*, at 88. In the instant case, as in *Berger v. United States, supra*:

> . . . We have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded or inconsequential. A new trial must be awarded.

Id. at 88.[7]

[7]As evidence of the pervasiveness of the prosecutor's misconduct, in addition to the above described conduct, the prosecutor also did the following: On direct examination, the prosecutor, contrary to the State Rules of Evidence, impeached his own witness who was an employee of Petitioner Bernard Horowitz by inquiring into the nature of an unrelated felony conviction for obtaining a fraudulent loan. (A. 18-19). This had the effect of permitting the jury to

2. PETITIONERS WERE DENIED THEIR RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT SINCE THE TRIAL COURT, AFTER BEING PUT ON NOTICE AS TO A CONFLICT OF INTEREST PROBLEM, FAILED TO ADEQUATELY INVESTIGATE AND RECTIFY IT.

One of the attorneys representing the Petitioners at trial, Albert Siegel, was listed as a State's witness (A. 5-6), and had previously represented (A. 30-31) and helped secure immunity from prosecution (A. 20-21), for a former co-defendant turned State's witness. (A. 30-31). As a result, Mr. Siegel had a clear conflict of interest in this case. The Trial Court's failure to effectively remedy this situation resulted in Petitioners being denied due process of law as guaranteed by the Fourteenth Amendment.

(Footnote 7 Continued)

improperly infer that the Petitioner had a bad character and evil motive and was contrary to F.S.A. §90.09 (A. 34) in effect at the time of trial. Additionally, the prosecutor questioned a State's witness regarding an out-of-court conversation the witness allegedly had with Petitioner Bernard Horowitz wherein Petitioner Horowitz requested 1200 lot releases (A. 11-14). On *two* occasions, the prosecutor elicited from the witness, over Petitioner's objections (A. 13-14, 17-18), that he told Petitioner, "What good would [the releases] do *because the crime has been committed* [Emphasis added]. (A. 13, 17). *The prosecutor elicited this testimony from the witness a second time* (A. 17) despite Petitioner's initial objection (A. 13-14) and the trial Court's instruction to the jury to "disregard" the witness' opinion (A. 14). These repeated elicitations of an unadopted, irrelevant, prejudicial lay opinion (which was clearly hearsay as to David Horowitz) usurped the jury's province as the sole determiner of guilt or innocence and was clearly prejudicial to Petitioners.

The right of an accused to have assistance of counsel, free from conflicting interests, has been recognized by this Court in *Glasser v. United States*, 315 U.S. 60 (1942) where this Court stated: ". . . 'Assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by . . . one lawyer . . . simultaneously represent[ing] conflicting interests. If the right to assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." *Id.* at 70.

It is also firmly established that a *court*, when put on notice as to a possible conflict problem, has a *duty* to investigate and take the necessary steps to alleviate the problem. In *Holloway v. Arkansas*, 435 U.S. 475 (1975), this Court stated:

> Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel.
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> * * *
>
> Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused *by insisting, or even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court.*

Id. at 484 [citations omitted]. This Court underscored this principle in the recent case of *Cuyler v. Sullivan*, 446 U.S. 335 (1980) where it held that a court must initiate an inquiry if it "knows or reasonably should know that a particular conflict exists." *Id.* at 347. The issue of a court's duty to respond to a possible conflict of interest problem was addressed by this Court, at its last term, in *Wood v. Georgia*, ___ U.S. ___, 101 S.Ct. 1097 (1981). In *Wood*, this Court was precluded from addressing the question raised by petitioners since it noticed that the record suggested petitioners' counsel was in a possible conflict of interest situation which could have deprived petitioners of their right to due process of law. The majority in *Wood* found that the lower court should have been aware of the conflict problem since the State explicitly raised it and requested the lower court to look into it. *Id.* at 1104. In remanding for further findings concerning possible conflict of interest violations, this Court stated: "Moreover, *Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or should know that a particular conflict exists.' " [citations omitted]. *Wood v. Georgia, supra*, at 1104 n. 18.

Granting this Petition for Writ of Certiorari would enable this Court to specifically prescribe how extensive a court's inquiry must be when it is faced with a possible conflict of interest problem and to elaborate on what other steps a court can take to alleviate the problem. Although it is well settled that a trial judge faced with a possible conflict situation *must* make an inquiry into it, *Holloway v. Arkansas, supra*, at 485, *Cuyler v. Sullivan, supra*, at 347, *Wood v. Georgia, supra*, at 1104, the *extent* of this inquiry and what additional courses of

action a judge may take have never been delineated by this Court.

In the instant case, even though a conflict of interest situation was present and this was brought to the Court's attention, the trial judge failed to adequately respond to it, thereby depriving Petitioners of their right to due process of law. Mr. Ben Cohen and Mr. Albert Siegel were the two attorneys involved in the representation of Petitioners. Although at times during the trial it was difficult to discern which attorney was representing which Petitioner (A. 9-10), it is clear from the Record that Mr. Siegel actively participated throughout the trial and, in effect, acted as co-counsel for the Petitioners. One of the State's key witnesses testifying at trial was Lester Green. Mr. Green had been named as a defendant in the State's original criminal Information (A. 27) and was represented by Mr. Siegel at that time. (A. 30-31). In fact, Mr. Siegel assisted in getting Mr. Green immunity from prosecution in exchange for his testimony against Petitioners. (A. 20-21). Moreover, Mr. Siegel himself was listed as a State's witness (A. 5-6). Because of Mr. Siegel's close affiliation with a key State witness and his involvement in the salient facts and events which led to the charges against the Petitioners, a conflict of interest clearly existed.

Furthermore, the trial court was fully apprised of the conflict problem but did not adequately respond to it. The prosecuting attorney made the following statements at trial:

> That is an obvious objection Your Honor. Mr. Siegel is here solely as an assistant. *I have already made known to the court of the inherent*

> *conflict of interest that is involved in this case . . .*

(A. 15). [Emphasis added]. Subsequently, the Court responded:

> I think we all agree that the possibility of a conflict of interest is there because you represented Mr. Greene. Mr. Greene will be testifying here against the Horowitzes . . . But the Horowitzes were here during the full hearing we had on this the first day before trial started. We have fully apprised them of what the conflict is and they waived that. . . . the court does not see a conflict of interest at this time.

(A. 16).[8]

It is clear then that the conflict of interest problem was certainly "brought home to the court", *Holloway v. Arkansas, supra,* at 484, and that the Court failed to adequately inquire into it and take steps to alleviate it. As this Court stated in *Wood v. Georgia, supra,* at 1104:

> These facts demonstrate convincingly the duty of the court to recognize the possibility of a

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[8]The hearing referred to was, to say the least, a half-hearted effort to determine whether a conflict existed. All the ramifications of Mr. Siegel's conflicts were not fully examined. Certainly, there was no *affirmative showing* that the "waiver" was intelligent and voluntary and done with sufficient awareness of the relevant circumstances and likely consequences. See *Boykin v. Alabama,* 395 U.S. 238 (1969); *Brady v. United States,* 397 U.S. 742, 748 (1970). (A. 25-26).

> disqualifying conflict of interest. Any doubt as to whether the court should have been aware of the problem is dispelled by the fact that the state raised the conflict problem explicitly and requested that the court look into it.

Because the Court, in the instant case, did not "look into it" sufficiently, Petitioners were deprived of their constitutionally guaranteed right to due process of law and as such are entitled to a reversal of their conviction. See, *Wood v. Georgia, supra,* at 1104 n. 18, n. 21, *Cuyler v. Sullivan, supra.*

3. PETITIONER DAVID HOROWITZ WAS DENIED DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE WAS REPRESENTED AT TRIAL BY THE SAME ATTORNEYS WHO REPRESENTED THE CO-DEFENDANT IN THE CASE.

Bernard Horowitz and David Horowitz, the only two persons to be tried on these charges, are father and son, respectively. Neither Horowitz testified in his own defense and the record indicates that both Horowitzes were treated as one entity by counsel.[9] The claim that the two Horowitzes had conflicting interests and should have had separate counsel is underscored by David's acquittal in a subsequent case brought in the United

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[9]Counsel continously referred to a "Mr. Horowitz" never mentioning first names. In speaking of a bank account of a "Mr. Horowitz", which was used to deposit the proceeds of some of the land sales, counsel neglected to point out which Mr. Horowitz had authority to sign on the account. It was Bernard, not David. (A. 11).

States District Court for the Southern District of Florida. That case was based on the identical facts which resulted in the State Court conviction. Bernard Horowitz was not tried with his son in the Federal trial. (A. 37).

At the threshold, we recognize that "[r]equiring or permitting a single attorney to represent co-defendants . . . is not per se violative of constitutional guarantees of effective assistance of counsel." *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978). This Court, in *Holloway, supra*, recognized the inherent constitutional infirmities in joint representation.[10] However, dual or joint representation of defendants should raise a question by the court or by counsel of a possible conflict of interest. *Holloway, supra*, at 483, n. 6. See also, *Glasser v. United States*, 315 U.S. 60 (1942).[11] In *Holloway* and

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[10]The Court also posited that an infraction of the constitutional rights to counsel "can never be treated as harmless error." *Holloway v. Arkansas*, 435 U.S. 475 (1978).

[11]The American Bar Association, in its STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, THE DEFENSE FUNCTION, §3.5(b) (1974), states:

> Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

Glasser, counsel recognized, and brought to the Court's attention, the potential conflict of interest between the defendants. In David Horowitz's case, it was counsel for the State who raised the spectre of conflict, while defense counsel remained adamant that there was no such conflict.[12] (A. 16).

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), this Court addressed the question of conflict of interest between defendants represented by the same attorneys when no objection to that representation is made. In *Cuyler*, two attorneys were privately retained to represent three defendants charged with murder. Two of the defendants were acquitted in separate trials while Sullivan, the third defendant, was convicted. This Court refused to impose a duty upon Sullivan's trial judge to inquire about a conflict of interest where there is joint representation of defendants, since nothing in the circumstances of the case, including the lack of an objection, required such an inquiry.

> Absent special circumstances . . . trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. Indeed, as the court noted in *Holloway, supra*, . . . trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel . . . unless the trial court knows or reasonably should

[12]It is possible that Horowitz's counsel confused conflict of interest between (1) the defendants and (2) defense counsel and some of the State's witnesses whom counsel had previously represented.

know that a particular conflict exists, the court need not initiate an inquiry. *Cuyler, supra*, at 347. [Citations omitted].

The prosecutor's remarks to the Court, discussed *supra*, page 15, presented the Court with the "special circumstances" referred to in *Cuyler*. Once the conflict of interest between the Horowitzes was recognized, the issue is whether the conflict "adversely affected his lawyer's performance." *Cuyler, supra*, at 350. Here, counsel for the Horowitzes rarely, if ever, distinguished the two defendants by name. (A. 11); refused or neglected to separate the Horowitzes when certain possibly incriminating evidence was introduced—such as the bank account, (A. 11); and never sought to define the roles that father, Bernard, and son, David, played in the structure of the companies which the State claimed were used to bilk unsuspecting investors. When tried in Federal Court (with different counsel), these points, which should have been obvious to defense counsel, were raised to successfully defend David Horowitz. (A. 37-39). That they may have been raised to the detriment of his father, Bernard, emphasizes the need for separate, independent counsel for the Horowitzes:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing . . . . [T]he evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial, but also as to possible pretrial plea negotiations and in

the sentencing process. *Holloway, supra,* at 489, 490 [Emphasis in original].[13]

[13]See also, *Zuck v. Alabama,* 588 F.2d 436 (5th Cir.), *cert. denied,* 444 U.S. 833 (1979); *United States v. Martinez,* 630 F.2d 361 (5th Cir. 1980), and *Johnson v. Hopper,* 639 F.2d 236 (5th Cir. 1981). In *Martinez, supra,* at 362, the rule in the Fifth Circuit applicable to conflict of interest was stated:

> If a criminal defendant is represented at trial by an attorney, either appointed or retained, who labors under an actual, and not merely a potential, conflict of interest, the defendant has been denied effective assistance of counsel as a matter of law; *and,* unless he has knowingly and intelligently waived his Sixth Amendment right to conflict-free representation, reversal is automatic. No prejudice need be shown.

CONCLUSION

We respectfully urge the Court, for all the reasons set forth above, to grant a Writ of Certiorari and to reverse the decision below.

Respectfully submitted,

MICHAEL TARRE, ESQ.
25 West Flagler Street
Suite 733
Miami, Florida 33130

Telephone: (305) 377-8155

(Counsel for Petitioner David Horowitz)

JOEL HIRSCHHORN, ESQ.
By: Joel Hirschhorn, P.A.
742 Northwest 12th Avenue
Miami, Florida 33136

Telephone: (305) 324-5320

(Counsel for Petitioner Bernard H. Horowitz)

Appendix

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT JANUARY TERM 1981

BERNARD H. HOROWITZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 78-2541

DAVID HOROWITZ,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 78-2542.

Decision filed May 6, 1981

Consolidated appeals from the Circuit Court for Broward County; Robert A. Butterworth, Judge.

Joel Hirschhorn, Miami, for appellant—Bernard Horowitz.

William O'Neill, III, of Eidelstein and O'Neill, Miami Beach, for appellant—David Horowitz.

Michael Satz, State Attorney, Ft. Lauderdale, Mary E. Marsden, Special Assistant State Attorney, Miami, and Walter W. Wood, Special Assistant State Attorney, Tallahassee, for appellee.

PER CURIAM.

AFFIRMED.

BERANEK and HERSEY, JJ., and WARREN, LAMAR (Associate Judge), concur.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA FOURTH DISTRICT

CASE NO. 78-2541 and 78-2542.

BERNARD H. HORWITZ,
and DAVID HOROWITZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

June 10, 1981

BY ORDER OF THE COURT:

ORDERED that the May 19, 1981 Motion for Rehearing filed by Appellant, David Horowitz, is hereby denied; further

ORDERED that the May 19, 1981 Motion for Rehearing filed by Appellant, Bernard H. Horowitz, is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath,
CLYDE L. HEATH,
CLERK

cc: Joel Hirschhorn, Esq.
William O'Neil, III, Esq.
Walter W. Wood and Mary E. Marsden,
Special Assistant State Attorney
Michael Satz, State Attorney (17th)

IN THE COUNTY COURT IN AND
FOR BROWARD COUNTY, FLORIDA

Case No. 77-3948CF-A & B

Judge: Butterworth

STATE OF FLORIDA,

Plaintiff,

vs.

BERNARD H. HOROWITZ, et al.

Defendant(s).

SUPPLEMENTAL LIST OF PERSONS WHO HAVE INFORMATION WHICH MAY BE RELEVANT TO THE OFFENSE CHARGED

COMES NOW, the State of Florida by and through its undersigned Assistant to the State Attorney and responding to that certain Motion for Discovery on file herein, submits the following.

James S. Mofsky,
Law & Economics Center
University of Miami Law School
P.O. Box 248000
Coral Gables, Florida 33124

Albert G. Siegel,
223 1st Street
Miami Beach, Florida 33139

Mary Cardani,
9153 Fountain Bleau Blvd.
Miami, Florida

Lester Green,
190 NE 211th Street
Miami, Florida

Joseph R. Klinger,
Senior Commercial Officer
(or designated alternate)
First Pennsylvania Banking & Trust Co.
1500 Market Street
Philadelphia, Pennsylvania 19101

I HEREBY CERTIFY that a true copy hereof has been furnished by mail this 17th day of May, 1978 to Ben Cohen, 420 Lincoln Road-Penthouse, Miami Beach, Florida, and J. Jerry Zeltzer, Suite 238, 420 Lincoln Road, Miami Beach, Florida 33139.

MICHAEL J. SATZ
State Attorney

/s/ Walter W. Wood
Assistant to the State Attorney

IN THE CIRCUIT COURT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO. 77-3948 (B, C, D and E)

JUDGE: BUTTERWORTH

STATE OF FLORIDA,

Plaintiff,

vs.

BERNARD H. HOROWITZ, et al.

Defendants.

NOTICE OF APPEARANCE

COMES NOW the undersigned attorney and notices his appearance as co-counsel for the Defendants, BERNARD H. HOROWITZ and DAVID J. HOROWITZ.

Law Office of Ben Cohen
Co-counsel for
BERNARD H. HOROWITZ
DAVID J. HOROWITZ
420 Lincoln Road-Penthouse
531-3403
Miami Beach, Florida 33139

BY: /s/ Ben Cohen
BEN COHEN

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appearance was mailed to WALTER W. WOOD, Esq., Assistant State Attorney Broward County Courthouse, 201 SE. Sixth Street, Room 620, Ft. Lauderdale, Fla. 33301, ROBERT G. SEEGEL, 223 First Street, Miami Beach, Fla., JOEL HIRSCHHORN, Esq., HIRSCHHORN & FREEMAN, P.A., 742 NW 12th Avenue, Miami Fla. 33136, and to J. JERRY ZELTZER, Esq., Suite 238, 420 Lincoln Road, Miami Beach, Fla. on this 11th Day of May, 1978.

/s/ Ben Cohen

BEN COHEN

[31-32] MR. JOLLY: Who is going to be arguing the motions?

MR. COHEN: I made it very clear I am representing Mr. Bernard Horowitz. He [Mr. Seigel] is representing David, and I am representing Bernard. I have said that before, and I guess he won't remember it until we come back up again.

* * *

[153-154] THE COURT: Are both of you representing them independently?

MR. COHEN: That's right. If Mr. Siegel has to leave, I will take over for him.

If we can ever keep Mr. Jolly still for five minutes at a time, we will get along with this case.

THE COURT: I don't think I can allow an attorney representing a client to leave during the proceedings. If you have to go, Mr. Siegel—

MR. COHEN: That will be up to Al.

THE COURT: If he is the leading attorney on one of the clients, there is no way I can let him leave.

MR. SIEGEL: I am listening to all of this, and of course, what amazes me the most is I have never really seen this before where the prosecuting attorney takes over the court. That is exactly what has been happening throughout here. I have told the Court exactly what my position is. I made it very plain. I did this on the

demands of Mr. Jolly. I responded to it. I told the Court yesterday — Does the Court wish me to reiterate my position?

THE COURT: The Court basically does have a problem as to what you're doing. If you plan on leaving sometime during the trial, that is your choice.

MR. COHEN: I will represent both of them and Mr. Siegel will assist me when he is here. Is that what it is, Mr. Siegel?

MR. SIEGEL: Mr. Cohen is the lead counsel, and whatever Mr. Cohen is representing to the Court at this time, I am abiding by it.

THE COURT: Would you put a paper clip on that? That Mr. Cohen is the lead attorney? Therefore, I know there will only be one opening and one closing. Right? One attorney makes objections; right, in front of the jury, unless you both argue out of the hearing of the jury.

MR. COHEN: I will represent both of them.

MR. SIEGEL: Mr. Cohen is on the record as representing Mr. Bernard and David Horowitz.

THE COURT: Therefore, you are free to leave anytime you wish. Any other matters, Mr. Jolly, you would like to bring up before the jury comes back in?

MR. JOLLY: No. I am satisfied.

* * *

[365] Q All right. Now, and what names were required in order to pay the investors, if you know, from the Miami National Bank? Could *Mr. Horowitz* do it himself?

A I don't recall. I have seen checks, and I didn't pay that much attention to it, to tell you the truth.

Q Well, were you informed that this was a joint account from which Rinehart's organization and *Mr. Horowitz* had to both sign in order to pay these to the investors?

A That would make sense, but I just told you I don't recall any of the signatures that were on it.

[Emphasis added]

* * *

[1074] Q (By Mr. Jolly) As a result of your information, what did you do?

A I came down to Florida to try to find out what was going on.

Q At any time during those two days, did you have conversations with the defendant, Bernard Horowitz, regarding releases?

A Yes.

Q What did you say, and what did he say?

MR. COHEN: Is that in regard to releases, if the Court please? That's all I want to know.

THE COURT: It appears to be.

Q (By Mr. Jolly) Well, it was the question.

What was the conversation that you had with Bernard Horowitz?

A It varied. The one conversation was where he requested my assistance in the paying off—in obtaining 1200 releases.

Q And what did you say?

A For what purposes?

Q What did he say?

A It was in relation to the State action against Equitable Development Corporation.

MR. COHEN: May it please the Court, we will have to go into this.

* * *

[1084] THE COURT: Mr. Jolly, you may proceed.

Q (By Mr. Jolly) What was said in this conversation, if you recall?

A The request of the 1200 releases was made. I asked why, and the response by the attorney was —

MR. COHEN: We will object to any response by any attorney.

THE COURT: Sustain the objection.

Q (By Mr. Jolly) Who else was present during the conversation?

A Bernard Horowitz, David Horowitz, Richard Friedman and the attorney representing Mr. Horowitz to the State proceedings.

Q Was anyone told to do anything?

A I was asked to obtain the 1200 releases.

Q Was there any further conversation?

A Yes.

MR. COHEN: Shall I ask with whom the conversation was with?

Q (By Mr. Jolly) What did you say and to whom did you direct it?

A I directed it to Bernard Horowitz. I said I could not see how the releases of the 1200 lots, at this time, would avoid the crime which I saw.

MR. COHEN: I object to that.

* * *

[1113] THE COURT: The Court is concerned with the comment that the crime had been committed. The Court finds that is not mistriable, as a matter of law, but I think as it stands now, I have to give them an instruction.

MR. JOLLY: Your Honor, they have been back there, and we haven't gotten the rest of the testimony out. They haven't heard all of the testimony.

THE COURT: I think even with the rest of the testimony out, we have to tell them that despite the fact that he thought the crime was committed, it is not binding on them at all. They are the ones that determine the guilt or innocence.

* * *

[1117] THE COURT: We are going to send the jury home a little bit early today. I want to give you an instruction before you leave.

The jury, you people on the jury, are the only ones that are to determine guilt or innocence of the defendants from the facts and the law as given to you by the Court at the close of the trial. The fact that a witness may or may not have believed a crime was committed is to be ignored and disregarded by the jury because you are the ones to determine whether or not a crime has been committed. Okay?

Now, has anyone seen anything in the papers about this case? TV? Spoke with anyone about the case? Okay. See you at 1:00 o'clock tomorrow.

* * *

[1159-1160] MR. COHEN: One more thing, Your Honor. Mr. Jolly, I am sure you are going to go (indicating), but I am not acquainted with all of the facts in the operation of the original deal with Delstar, although I am going to attempt to at cross examination. I would like to have Mr. Siegel, who is eminently acquainted—not to repeat any of the questions of what I may ask—but I would like to have him have the right to finish up on the parts that I don't have the knowledge of. I don't have all of that knowledge, as you can understand from hearing the evidence from the stand. This one particular witness is all I am asking that Mr. Siegel be allowed to take over where I leave off.

THE COURT: State?

MR. JOLLY: That is an obvious objection, Your Honor. Mr Siegel is here solely as an assistant. *I have already made known to the Court the inherent conflict of interest that is involved in this case.* This would just further that. This would just cause problems and not alleviate any problems. Mr. Cohen is an attorney of record. He is the attorney that the two men hired—I am assuming hired—to act as their counsel, and I have an objection.

[Emphasis added]

* * *

[1164] THE COURT: I think we all agree that the possibility of a conflict of interest is there because you represented Mr. Green. Mr. Green will be testifying here against the Horowitzes.

MR. COHEN: He has not testified here.

THE COURT: But the Horowitzes were here during the full hearing we had on this the first day before the trial started. We have fully apprised them of what the conflict is and they have waived that.

MR. SIEGEL: Has the Court heard one word of testimony from Lester Green?

THE COURT: The Court does not see a conflict of interest at the present time.

MR. COHEN: You will order the State's Attorney—Assistant State's Attorney to stop this accusing him of a conflict of interest until such time as it appears to the Court that there is such?

THE COURT: The State shall be so instructed. Mr. Jolly, you shall conduct yourself accordingly. Until a conflict is shown, you will not accuse Mr. Siegel of a conflict of interest.

* * *

[1168-1169] Q Did the topic of releases come up?

A Yes, sir.

MR. COHEN: We object, if the Court please. He is leading the witness.

THE COURT: Sustain the objection.

Q (By Mr. Jolly) Tell this jury what you asked Bernard Horowitz and what, if anything, he responded.

A I asked him again about the mortgage program that—"What is the real problem?" At that time, I was advised that he needed the 1200 releases. That is the first time I gained information to the magnitude of the mortgage program upon which I was requested for the releases. Mr. Bernard Horowitz was there and Richard Friedman and the situation was, if I could relate it to you, tense, and he asked me for the 1200 releases.

Q Who asked you?

A Bernard Horowitz.

Q What, if anything, did you say in response?

A I said, "For what?" He said, "Well, the problem will kind of go away." And I said, "What good would this do, because the crime has already been committed."

MR. COHEN: May it please the Court, that is the same thing.

(Whereupon, the following proceedings were had at the bench, out of the hearing of the jury:)

MR. COHEN: This man has absolutely no regard—

THE COURT: The Court ruled that was okay.

MR. COHEN: The same thing coming in again? We are entitled to a mistrial after you have admonished him. Now, he does the same thing again. You gave an admonition to the jury.

* * *

[1348] A Eugene Tannenbaum. T-a-n-n-e-n-b-a-u-m.

Q What is your present residence address?

A 6601 Southwest 76th Terrace, South Miami, Florida.

Q What is your present occupation?

A I'm employed by a land development company.

Q Would you kindly tell the jury a little bit about your background, Mr. Tannenbaum?

A I have an undergraduate degree in accounting from the College of the City of New York. I have a degree of law from the University of Miami. I was admitted to practice in February, 1952, in Florida. I practiced in Miami, Florida, until late '71, or early '72—I don't recall the year—at which time I had been disbarred, and subsequently was convicted and served some time for a felony.

Q Your conviction, sir, was for what?

A At that period of time, I was an officer of a bank, and I was charged with use and undue influence of obtaining a fraudulent loan—

MR. COHEN: Wait a minute. I object. Your Honor, may we approach the bench?

* * *

[1355] MR. JOLLY: I am not going into anything further than, "What have you been convicted of?"

THE COURT: Overrule the objection.

MR. COHEN: Judge, how can he bring it out and we not? I don't understand what rules of evidence we are going by.

THE COURT: I am not ruling that he can or can't. I am not ruling that you can't. I am not ruling on that.

MR. COHEN: Well, the State admits that we can't do it, and to ask the man, if it is going to embarrass him, I am sure he isn't pleased with this type of testimony.

THE COURT: Do you mind answering these questions to the State?

THE WITNESS: I have a reality of what I have done exists. I don't have an objection to it.

* * *

[1758-1759] Q (By Mr. Jolly) Mr. Green, I guess we have discussed the case formally two times. One occasion was the day you were going to testify, if you were going to testify; correct?

A Correct.

Q The first time was when we subpoenaed you in?

A Yes.

Q Now, that first time, did you come to that hearing with your lawyer? Did you come to that hearing with that attorney?

A I came with a friend who happened to be an attorney.

Q Had that friend ever represented you in the past?

A Yes, he did.

Q Was that friend present at the time that that statement was initiated?

A At the beginning part.

Q That friend was Mr. Albert Siegel?

A That's correct.

Q Did he in fact not put on the record that you must be receiving immunity before you would testify?

A Yes.

Q Wasn't he acting as an attorney giving you legal advice?

A Well, he was coming as my friend. He had told me previously that after the State dropped the charges against me, nolle prosequed the case, he couldn't be my attorney any more, and that was settled at that point. I did ask him to come as a friend to make sure that I was given the immunity.

Q In fact, you relied on his advice?

A I don't know whether you would call it relying on his advice or not. I would say so.

* * *

[2255-2256] MR. JOLLY: Ladies and gentlemen of the jury, Your Honor, Mr. Cohen and Mr. Siegel. I will be brief. You have heard it all. You have certainly heard all of the evidence. There are a few points that I wanted to raise; or a few points that need to be explained by way of defense.

Now, one thing that comes up repeatedly, both Mr. Siegel and Mr. Cohen mentioned that both the defendants are in fact facing 105 years in prison and/or a $5,000.00 fine—a maximum penalty of a $5,000.00 fine. Now, there is a minimum. They can walk out of here. This is an instruction that Your Honor is going to read to you. Now, almost simultaneously or immediately thereafter, the Court is going to instruct you that you are to disregard the consequences of your verdict. In other

words, the penalty, whatever it might be that they are facing by virtue of this verdict, is not to be a factor in your deliberations. Even if they were facing life, death, or nothing, it is not a factor that shouldn't be a factor in your determinations. You are the fact-finder in this cause. You are going to decide whether or not they committed a crime.

His Honor has been sitting on this bench a long time. He has a pretty good idea what is fair or what is not fair. He is going to be the sentencing agent; not you people as jurors. Don't worry about what is going to happen to them afterward. That is not a part of your verdict. You are to decide whether or not they are guilty; whether they defrauded these people. *You are to decide if they are responsible for the financial loss suffered by these individuals.*

MR. COHEN: Objection. That is not the law.

THE COURT: The Court will instruct them on the law at the end of the trial.

[Emphasis added]

* * *

[2268-69] *"If your intention was good, Bernard Horowitz and David Horowitz, why were not these releases obtained back in January and February? If your intentions were good—"*

MR. COHEN: May it please the Court, I have a motion to make outside the hearing of the jury.

(Whereupon, the requested portion of the record was read by the reporter as above recorded.)

MR. COHEN: That is asking a question of the defendants and again commenting on why they did not take the stand.

May it please the Court, this is as direct as anything can be, and asking them why they didn't testify and tell about it; asking them why, and says, "Why didn't you do this at this time?"

THE COURT: Overrule the objection.

[Emphasis added]

* * *

[2271-2273] THE COURT: I think you might have properly stated it the first time on your opening of the closing. *The Court is kind of concerned when you go right to the defendants and point to them and say "Why?" And then there is a silence because they never answered on the stand what happened. There has to be a silence after that.*

MR. JOLLY: I will attempt to do it. Frankly, you haven't said I did anything improper. You have told me you don't like it. I will adjust my argument to what you want.

MR. COHEN: You're not saying it is improper, Judge?

THE COURT: I am not. He hasn't even finished the question.

MR. COHEN: You didn't hear that question? You didn't hear this question completed when he said to them—

MR. SIEGEL: What do you want? How can you handle this? This is as blatantly wrong and Your Honor knows that we do not have the right to put the defendants on the stand at this point. He has put them on the stand. Do we have a constitutional privilege of remaining silent? He puts their back to the wall, puts them on the stand and has violated their constitutional privilege of remaining silent. He has forced our hand. He can't do it.

MR. COHEN: Your Honor, please. I know how you want to get this case over. But Lord knows, we have got to go by some rules at some time or another. Believe me, I think for our own defendants we are making a mistake, but I can't, as a lawyer, allow anything like that to take place, nor should Your Honor, as a judge, allow it to take place. And the argument—we have it the second time now.

THE COURT: The Court does not believe what he said originally was the same thing.

MR. COHEN: This was worse.

MR. JOLLY: I did not turn to the defendants and the record shouldn't reflect that I did, because I did not.

MR. COHEN: For God's sake, the Court saw it. I saw it.

THE COURT: This is final argument. The Court does not believe this is mistriable at all. I believe Mr. Jolly did not complete making the comment, and Mr. Jolly may continue when the jury comes back in.

[Emphasis added]

* * *

[2278-2279] Now, what I am suggesting to you is this: $2,800.00 was what was going to be paid back, in excess of what was brought in and all the corporation actually got was $2,050.00. That leaves $750.00 in the hole. Now, this presupposes—this figure presupposes that they intended—intended to never get the releases. That was financially impossible. It was financially unfeasible. They never could have, because they were in the red. It never would have worked.

MR. COHEN: May it please the Court, that is not in argument of anything that has appeared in the case.

MR. JOLLY: This is in evidence.

* * *

[51-52] THE COURT: The Horowitzes have been here all morning. You have heard what went on, *I guess*, and you are aware that Mr. Siegel did represent this Mr. Greene. He will be testifying, it appears, from the State's calling him against your interest. You may

wish, if you want, to question Mr. Siegel further. He assists Mr. Cohen on the case.

Bernard Horowitz?

BERNARD HOROWITZ: *We would like him to stay.*

THE COURT: *David Horowitz?*

DAVID HOROWITZ: Yes.

[EMPHASIS ADDED]

* * *

[2631]

(F) 517.302

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

THE STATE OF FLORIDA

VS.

EQUITABLE DEVELOPMENT CORPORATION, A CORPORATION; BERNARD H. HOROWITZ a/k/a BERNIE HOROWITZ; DAVID J. HOROWITZ a/k/a DAVE HOROWITZ; MARY CARDANI; LESTER GREEN; FINANCIAL RESOURCES CORPORATION, A CORPORATION; ROBERT A. RINEHART a/k/a BOB RINEHART

INFORMATION FOR

I. thru XXI. SALE OF UNREGISTERED SECURITIES

XXII. thru XLII. SALE OF SECURITIES BY UNREGISTERED DEALERS OR SALESMEN

XLIII. thru LXIII. FRAUDULENT SECURITIES TRANSACTIONS

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

* * *

[2650]

IN THE CIRCUIT COURT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO. 77-3948CFB

STATE OF FLORIDA,

Plaintiff.

-vs-

BERNARD H. HOROWITZ a/k/a
BERNIE HOROWITZ,

Defendant.

ARRAIGNMENT

This case was called for arraignment before the Honorable Judge REASBECK. The defendant was present in open court with counsel, and entered a plea of (stood mute and the court entered a plea of not guilty).

The following persons were present:
Attorney of Record: Albert G. Siegel
and C. Shelby Dale
State Attorney: Walter Wood
Court Reporter: Blanche Gloetzner

The following documents were filed:
Appearance of Attorney
Motion to Reduce Bond

The defendant be allowed 20 days in which to file motions.

BY: /s/ [illegible]
Deputy Clerk

TRIAL DATE: 8-4-77 Docket Sounding
JUDGE: Lasher

[2671] [Filed 17 SEP 19]

IN THE CIRCUIT COURT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO. 77-3948 (B,C,D and E)

JUDGE: Lasher

STATE OF FLORIDA,

Plaintiff,

vs.

BERNARD H. HOROWITZ, DAVID J. HOROWITZ,
MARY CARDANI and LESTER GREEN,

Defendants.

MOTION FOR ADDITIONAL TIME TO FILE MOTIONS

COMES NOW the Defendants, BERNARD H. HOROWITZ, DAVID J. HOROWITZ, MARY CARDANI and LESTER GREEN, by and through the undersigned, and move the Court to grant necessary time to file additional pretrial motions, and, as grounds, say:

1. The complexity of the case, unknown facts and unusual circumstances will probably make necessary the filing of additional motions by the Defendants.

2. This request will not prejudice the State, however, a denial would limit the Defendants in

preparation of their defense as additional facts become apparent.

I certify that a copy of the foregoing Motion has been mailed to WALTER W. WOOD, Esq., Assistant State Attorney, 201 S.E. 6th Street, Ft. Lauderdale, Florida 33301, JOHN BERK, Ewq., 111 S.E. 6th Street, Ft. Lauderdale, Florida, and JON AGEE, Esq., 1515 N.E. 4th Avenue, Ft. Lauderdale, Florida, this 16th day of September, 1977.

/s/ Albert George Siegel

ALBERT GEORGE SIEGEL
Attorney for BERNARD H. HOROWITZ,
DAVID J. HOROWITZ,
MARY CARDANI
and LESTER GREEN
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531-2052

[2682]

IN THE CIRCUIT COURT, IN AND
FOR BROWARD COUNTY, FLORIDA

Judge HUMES T. LASHER

CASE NO. 77-3948-CF-B-C-D

CHARGE(S) 63 Counts—Securities

STATE OF FLORIDA

vs

BERNARD HOROWITZ (B)
and
DAVID J. HOROWITZ (C)
and
MARY CARDANI (D)

HEARING PROCEEDINGS

BOOK 331 PAGE 1475

This case was called for hearing on Defense Motion(s) TO WITHDRAW. The Defendant was not present in open Court with counsel, the Honorable Albert G. Siegel. The prosecution was represented by the Honorable Walter W. Wood. Court Reporter Helen Lehtinen, was present.

The following witnesses were duly sworn and testified in this case, to-wit:

C. Shelby Dale, also present. Hearing on Motion (Filed in Open Court) to Continue Hearings set for October 13, 1977. Motion Granted, including Lester Green—"E" Case.

After due consideration the Court

GRANTED the Motion TO WITHDRAW, AS TO "B", "C", "D" CASES ONLY.

BY: [illegible] D.C.

STATE OF FLORIDA, BROWARD COUNTY
This instrument filed for record
7th day October, 1977
and recorded in CIRCUIT COURT MINUTES
Book 331 Page 1475 Record Verified

ROBERT E. LOCKWOOD, CLERK

BY: [illegible] D.C.

F.S. 90.09[14] **Impeachment of witness by party producing.** —**A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness prove adverse, contradict him by other evidence, or prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statement.**

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[14]This statute was in effect at the time of trial. Repealed July 1, 1978.

UNITED STATES CONSTITUTION

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

ARTICLE XIV

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[2937]

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
BROWARD COUNTY, FLORIDA

CASE NO. 77-3948-CF

(Judge Butterworth)

THE STATE OF FLORIDA,

Plaintiff,

-v-

BERNARD H. HOROWITZ and
DAVID J. HOROWITZ

Defendants.

AFFIDAVIT

The undersigned being duly sworn deposes and says:

1. That he has personal knowledge of the facts contained herein.

2. That he is an attorney, a member of the Florida Bar specializing in Criminal Law, with over ten (10) years experience representing numerous defendants in numerous jury trials in both State and Federal Courts in South Florida.

3. That he represented Robert Rinehart in UNITED STATES -v- BERNARD HOROWITZ, DAVID

HOROWITZ, ROBERT RINEHART et al, Case No. 78-49-CR-JE, which case was tried to a jury in the United States District Court for the Southern District of Florida, in August 1978.

4. That the issues in the federal trial were essentially the same as in the within case, i.e. the sale of Equitable Development Corp. promissory notes secured by real estate mortgages, the latter being fraudulently misrepresented to investors as first mortgages when in fact they were second mortgages, due to a prior purchase money mortgage to Delstar Corp.

5. That during the course of the federal trial Eugene Tannenbaum, an employee of Equitable Development Corp. in 1974 and 1975, testified to certain conversations with DAVID HOROWITZ concerning attempts by DAVID HOROWITZ to set up a systematic release procedure for lots used in the mortgage program, which attempts were thwarted by BERNARD HOROWITZ, DAVID HOROWITZ's father and co-defendant.

6. That Mr. Tannenbaum along with several other witnesses testified that BERNARD HOROWITZ controlled the policies of Equitable, that BERNARD HOROWITZ was the Equitable signatory on the joint bank account into which all the mortgage investors money was placed, and that BERNARD HOROWITZ received some SEVEN HUNDRED THOUSAND and 00/100 ($700,000.00) DOLLARS from Equitable in the form of officer loans, payments by Equitable of personal expenses and direct payments charged to finders fees and to other corporate expense categories.

[2938] 7. That the primary thrust of his defense for Robert Rinehart was that BERNARD HOROWITZ had used and duped Mr. Rinehart, along with many others, and in summation he utilized that argument repeatedly, including in the group of persons used and duped by BERNARD HOROWITZ, not only Defendant Robert Rinehart, but Defendant DAVID HOROWITZ and Defendant Robert Hunter as well.

8. That in his opinion DAVID HOROWITZ's best defense was the above argument, and the single most important piece of evidence adduced in the federal trial in support of said argument was the "thwarting" testimony referred to above.

9. That this opinion is based on his years of experience dealing with juries in criminal cases, and is supported by the fact that the jury in the federal case found Defendant DAVID HOROWITZ not guilty on all counts.

FURTHER AFFIANT SAYETH NOT

/s/ Joel Hirschhorn
JOEL HIRSCHHORN

Sworn to and subscribed before me this 1st day of Sept, 1978. My Commission expires:

/s/ [illegible signature]
Notary Public State
of Florida at Large